

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUFUS THERIAL FAIRLEY,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2000

No. 214639

Washtenaw Circuit Court

LC No. 97-009001-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL ANTHONY FAIRLEY,

Defendant-Appellant.

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No. 215313

Washtenaw Circuit Court

LC No. 97-009002-FC

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant brothers were jointly tried and convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. Defendant Rufus Fairley [“defendant Rufus”] was sentenced to 7-1/2 to 15 years. Defendant Carl Fairley [“defendant Carl”] was sentenced to 10 to 20 years, to be served consecutively, as a result of his parolee status, to a sentence he was then serving. Both defendants claimed appeals as of right. We consolidated these appeals and now affirm.

I

Defendant Rufus argues that the prosecutor failed to establish beyond a reasonable doubt that he possessed the requisite intent to kill. We disagree. Viewing the evidence in a light most favorable to the prosecution, *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), we conclude that the evidence was sufficient to sustain defendant Rufus' conviction.

The elements of the offense of assault with intent to commit murder are (1) an assault, (2) committed with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Plummer*, 229 Mich App 293, 305; 581 NW2d 753 (1998). Intent may be inferred from all the facts and circumstances. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995); *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence illustrating that the actor possessed the requisite intent is sufficient to sustain a finding that the actor had the requisite intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Although defendant Rufus correctly points out that the prosecutor failed to present any physical evidence of a second firearm being used in the shooting, the jury still could have found beyond a reasonable doubt that defendant Rufus had a firearm and discharged it based on the victim's testimony that he saw muzzle flashes coming from where defendant Rufus stood, the victim's cousin's testimony that she saw the "fire" from the "guns" and that "they were shooting," and a police officer's testimony that revolvers do not eject spent cartridges.

The jury could also have reasonably inferred that defendant Rufus discharged his firearm in the direction of the victim. Although the victim testified that he did not see where defendant Rufus was shooting, the victim also testified that he saw muzzle flashes at defendant Rufus' chest level. The location of the muzzle flashes at chest level is consistent with the shooter aiming directly at something, as opposed to shooting in the air or towards the ground.

Further, the evidence strongly suggested that defendant Carl intended to kill the victim. The jury could have found beyond a reasonable doubt that defendant Rufus discharged his firearm knowing his brother's intent, and that the discharge of his firearm, whether directed at the victim to cause fear or injury or just to keep others from coming to the aid of the victim, was an act aiding defendant Carl's commission of the assault. *Turner*, 213 Mich App 568.

Thus, viewed in a light most favorable to the prosecutor, the evidence was sufficient to support the conviction.

II

Defendant Rufus also argues that the trial court erred when it refused to instruct the jury with CJI2d 17.4(2)-(5). We disagree.

The trial court, when instructing the jury, must not exclude from jury consideration any

material issue, defense or theory supported by the evidence. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). When a challenge to the instructions is premised on a claim that error resulted from the failure to give a requested instruction, reversal is required only where (1) the instruction is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a defense. *Id.*, 159-160.

Here, after the trial court instructed the jury with regard to the elements of the charged offense, it also instructed the jury with CJI2d 17.4(1), thereby informing the jury that if the circumstances found by the jury would have reduced the charge to manslaughter had the victim died, then defendants were not guilty of assault with intent to murder. The court then apparently declined to give the remainder of the instruction because "[t]his was not brought up during the course of the trial."

On the record before us, we conclude that the trial court did not err by refusing to give the remainder of CJI2d 17.4. The instruction did not cover an important point raised at trial in light of the fact that defendant Rufus did not raise a mitigation claim before the jury. Further, the initial dispute with the victim occurred several days earlier, and the alleged "excitement of the moment," based on a verbal altercation between the victim and defendants' cousin, or defendant Carl's shooting the victim, would not cause an ordinary person to be moved to shoot out of impulse. Additionally, the objection that appears on the record is that the instruction was appropriate because

in view of the fact that [the victim] was carrying a gun, that this - - that if he had been killed, that this certainly could have resulted in an instruction of involuntary manslaughter and that that . . . instruction should have been given.

However, the victim's gun was found in a bag, with the clip out of the gun, and there was no testimony that the gun was out of the bag during the shooting. Under the circumstances, the trial court was justified in declining to give the remainder of the instruction.

### III

Defendant Rufus additionally argues that his conviction must be reversed due to prosecutorial misconduct, vouching and misrepresentation. We find no reversible error.

Defendant Rufus' first argument concerns two unpreserved evidentiary issues - - the victim's being permitted to display his scars to the jury, and the introduction of the victim's bloody clothes into evidence. Demonstrative evidence may be admitted in the trial court's discretion when the evidence aids the jury's understanding of other evidence or of the issues before it, especially where the evidence is relevant with regard to one of the elements of the offense. *People v Schmidt*, 231 Mich App 521, 534; 586 NW2d 766 (1998); *People v Daniels*, 192 Mich App 658, 673-674; 482 NW2d 176 (1992). Here, the evidence in question was relevant to show the life-threatening nature of the wounds by showing their location and the amount of blood loss. Thus, defendant Rufus has not shown plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-765, 774; 597 NW2d 130 (1999).

Regarding the claim that the prosecutor impermissibly vouched for the credibility of the victim, we conclude that when viewed in context, *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994), none of the remarks reflect an attempt to intimate that the prosecutor possessed special knowledge based on his office that the victim had testified truthfully and, therefore, that the jury should believe the victim, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). As to the claim that the prosecutor advanced an improper appeal to the civic duty of the jury, we disagree with defendants' characterization of the challenged comments. The prosecutor was asking the jury to convict defendants based on the evidence presented and not to acquit simply based on a belief that because the victim was a drug dealer he deserved to be shot. This argument was proper. *Bahoda, supra*, 284. Nor do we find reversible error based on appeals to jury sympathy. Viewing the prosecutor's arguments in context, including his remarks regarding the requisite intent, we find no plain error affecting substantial rights.

No. 215313

Defendant Carl first argues that he was denied a fair trial by the prosecutor's misconduct. We disagree.

We agree that the prosecutor's question regarding defendant Carl's prior possession of a gun were improper. However, reversal is not required. The question was a single question during an otherwise legitimate colloquy concerning whether defendant Carl would have felt the need to have a gun at the location of the shooting where he was engaging in drug transactions. It is unlikely that the single objectionable question and answer affected the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

We reject defendant Carl's remaining claims of prosecutorial misconduct, many of which echo defendant Rufus' claims, as failing to establish plain error affecting substantial rights. *Carines, supra*.

Defendant Carl next argues that the trial court committed error warranting reversal when, in the presence of the jury, the court expressed its belief that the assault with intent to commit murder charge only applied to defendant Carl. Defendant asserts that this error was prejudicial because it singled him out and "flagged" him as being the sole defendant charged with this offense.

Our review of the record reveals that any confusion expressed by the trial court concerning whether defendant Carl was the only defendant to be charged with assault with intent to commit murder was quickly cleared up in the presence of the jury and that the jury was correctly instructed that both defendants were charged with this offense. We do not see how the brief colloquy resulted in prejudice affecting the outcome of the trial. Clearly, the evidence against defendant Carl was stronger than the evidence against defendant Rufus.

Lastly, defendant Carl argues that he is entitled to a new trial because of the erroneous admission of evidence of a prior, uncharged altercation occurring three days before the shooting between the victim and defendants. Again, defendant Carl failed to preserve this claimed error by

timely objection below. Accordingly, we will only reverse if defendant Carl has satisfied the plain error rule. *Carines, supra*.

The prosecutor elicited testimony from several witnesses, including the victim, that three days before the instant shooting, the victim asked defendants to leave the porch of the victim's cousin's residence and that defendant Carl became "all frantic" and loud before eventually leaving. The testimony was relevant to the issues of identity and motive, and the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. Moreover, defense counsel referred to the incident in cross examining the witnesses.

Affirmed.

/s/ Donald S. Owens  
/s/ William B. Murphy  
/s/ Helene N. White